SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Plaintiff-Petitioner,

v.

THE UNITED STATES,
Defendant-Respondent.

BRIEF AMICUS CURIAE BY THE INFORMATION INDUSTRY ASSOCIATION

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BY THE INFORMATION INDUSTRY ASSOCIATION

This brief is submitted by the Information Industry Association with Petitioner's and Respondent's consent.

I.

NATURE AND INTEREST OF THE AMICUS CURIAE

The Information Industry Association (the"Association") is a membership associa-

tion with approximately 65 members. These run the gamut from large and small information companies to large and small manufacturers of technical equipment including computers and photocopiers. The members of the Association disseminate information accounting for billions of dollars' worth of sales a year. A great part consists of information material which has been selected, collated, editorialized and published at substantial expense and at great investment.

The basic function of this industry is in many respects the other side of the coin of traditional publishing. It is rooted in the abundance of information available to everyone in every discipline. As a general proposition it can be said that information companies identify particular information headaches of very specialized groups of people and seek to pre-process the information of interest to that group in such a way as to

facilitate its use.

The activities of member firms include, but are not limited to, the following:

(1) Topical publications--providing up-to-date information on all facets of a given special interest area, including law, regulations and/or tariffs topically arranged and cross referenced for easy access;

(2) Current awareness publications, such as indexes, collected tables of contents, abstracts, citation lists, reports on pending legislation, etc.;

(3) Catalogs, including mail-order catalogs, parts lists, price lists, and tables of interchangeable parts;

(4) Directories, including those classified by activity, address, etc.;

(5) Encyclopedias, directories, thesauri, finding lists and references, aids;

(6) Files searches, including computer searches of machine-readable files at the

computer site or by remote access terminals;

(7) Standing order services ranging from computer search of current publications through news clipping services offering delivery of information on specific interest profile topics;

(8) Manuals for operation and repair of equipment;

(9) Serial reports, such as court decisions, board rulings, financial reports;

(10) Periodic publication of related material, such as journals in hard copy or microform, and voice recordings of talks on related topics;

(11) Face-to-face meetings, such as symposia, conferences and conventions;

(12) Exhibits and demonstrations for educational, promotional or merchandising purposes;

(13) Tours of plants, facilities, monuments, museums, etc.

Although a variety of communications media are employed, all the above activities have in common the anticipation of the need for and the preprocessing of relevant information. They all involve the expenditure of time, money, and human effort in organizing information materials to meet anticipated needs. They all have a common objective--that of producing economically competitive information products relevant to the users interest, regardless of the media involved.

Many member activities relate to the preparation of what could be classed as "library materials"--materials in printed form for industrial, institutional, agency, business, shop, academic or personal collections. Others reorganize related reference materials for better access. Such products and services require frequent

reorganization and amendment to keep them current.

The whole information industry process is itself comparable to an individual author's efforts in creating a work. By taking an "exploded" view of the work of an information industry company it can be seen how its efforts relate to the creative efforts of an author.

The steps involved in creating and marketing an information product include:

(1) Start with the user. Identify his information problem or need. Spend time with him in his work environment to identify how he uses information, where he is when he needs information, whether he has an immediate need or a need that can be filled subsequently in time.

(2) Gather information from a wide variety of sources and experiences.

(3) Review it, analyze it, organize it, eliminate irrelevancies.

(4) Design a formula for putting it into machine readable form.

(5) Process it into a machine readable form

(6) Design a formula for manipulating the information within the machine to produce the specifically desired end product (4, 5 & 6 are not always necessary).

(7) Develop the graphic arts embodiment of that end product, and in other respects design and produce a "human-useable" product.

(8) Educate users to the advantages of the product and in other ways market the product to the group of users for whom the product is designed and developed.

Several points emerge from that list:

(a) Each of these steps, starting with the time spent identifying user needs and continuing through each step of the process to

the delivery of the product to the user, is complex and costly.

(b) The products of such efforts are works of authorship.

(c) By virtue of their special design and highly refined specialized markets, they are extremely sensitive to any attrition in the size of their expected market whether through photocopying or other replication methods for by-passing copyright protection. The economic viability of such products, whether they are to be created at all, depends pretty much on each user paying his fair share of the fully amortized cost of creating and delivering the product.

The interest of IIA is to underscore the significance of copyright and to emphasize the need to maintain the integrity of copyright as a funding mechanism for this process. Private risk capital will be applied to this process, and society will have the benefit

of continuing advances in the application of these varied technologies, only so long as the investors in this process have a reasonable expectation of receiving a reasonable return on their investment. The only alternative to the investment of private risk capital and the reliance on competition in the marketplace, not only the commercial marketplace, but the marketplace of ideas, is the reliance on the investment of state capital, and its attendant preemption of areas open to competition.

We believe that the Court of Claims' conclusions are in conflict with the basic principles of copyright law and endanger the economic viability, indeed the very existence, of the open, competitive marketplace of ideas on which our society depends.

II.

THE RULING OF THE COURT BELOW

The ruling of the Court below has applied a principle of fair use, applicable to labor-

ious hand copying, to the modern technology which permits rapid, massive and multiple copying by machine. In effect, the ruling of the Court below permits the copying in massive quantities by modern technology without payment of a royalty. It is respectfully submitted that such permission cannot help but endanger the revenue base which is an absolute necessity so that the production and dissemination of highly selective information can be economically sustained. It further will disrupt and be destructive of the economic relationships on which this nation's distinctive competitive marketplace of ideas depends.

III.

ISSUE

Is the operation of a comprehensive library duplication system, supplying thousands of copies of copyrighted articles, exempt from copyright infringement if it

serves the science community? If so, is that policy decision so major as to require legislative action?

IV.

ARGUMENT

A.

AS USERS AND SUPPLIERS OF INFORMATION WE HAVE TO PAY FOR ALL THINGS WE USE, AND WE EXPECT REASONABLE PAYMENT WHEN OUR PRODUCTS ARE USED.

As a result of the user/supplier dichotomy in the information industry we are extremely sensitive to the economic realities facing the user and the supplier of information. Since the industry is not subsidized by taxpayers it must charge for its products and services and pay for those products and services it uses that are created by others.

In analyzing how to accommodate the interests of science with those of publishers, the Court of Claims erred in failing to include in that balance the practices of the National Library of Medicine. While this

whole action has arisen out of the National Library of Medicine's desire to avoid paying the license fee requested by the plaintiff in this case, it seeks very substantial fees for its own products. Magnetic tapes containing citations to the indexed journal articles are available from NLM on a subscription basis. Individuals and organizations may subscribe for $30,000 per year under conditions prescribed by NLM regulations.1/

For the information it copies, NLM does not wish to pay. For the information it creates, it requires users in the science community to pay.

We seek only to emphasize that there are costs associated with the creation and distribution of information; costs which, in equity, should be fairly shared by the users of that

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1/ Selected Federal Computer-based Information Systems, Edited by Saul Herner and Matthew J. Velluci, Information Resources Press, Washington, DC, 1972, p. 98.

information, a view apparently supported by NLM's pricing policies on its products. We further believe, the traditional competitive marketplace for information, fostered by copyright laws, has been most effective in balancing these equities. The licensing proposal of the plaintiff in this case is illustrative of the cost-effective operations of that system and should not have been rejected by NLM or the Court of Claims.

B.

THE FUNCTION OF THE INDUSTRY IS TO DISSEMINATE, NOT TO WITHHOLD INFORMATION.

Copyright is a tool calculated to foster dissemination of information. By the simple expedient of granting the owner of the physical property on which an idea is stated a limited monopoly in the right to copy that statement, Congress has encouraged a large and growing number of people and companies willing to risk their resources in attaining

broad dissemination of the ideas contained therein.

What comes through the Court of Claims opinion is not only a misunderstanding of that system but of the people and companies so engaged. The Court of Claims was unwilling to rely on the offered licensing system in its words to "place such a risk of harm upon science and medicine." In this unwillingness the Court of Claims proposes instead to strip away from the publisher its most basic right, a right to reasonable compensation.

Apparently, the Court below was concerned lest by upholding the publisher's copyright, the publisher would extract exhorbitant prices from the user in science and medicine. Obviously, the element of competition is omitted from the Court's evaluation. If the copyright bundle of rights were to be exercised by the copyright owner at too high a price,

and others could produce comparable products at lower prices, competition would arise to provide the library and the user more competitively-priced services. The ideas expressed in copyrighted materials themselves are free to be used by others and the copyright system in this way encourages competition among suppliers of similar materials. It certainly is not contended that Williams & Wilkins holds a monopoly position in the science and medical publishing field. What needs to be recognized is the valuable contribution Williams & Wilkins, as well as many other commercial firms, are motivated to make under the protection offered their enterprise by copyright.

Stripped of the ability to withhold permission to make repeated and systematic photocopies, and in the face of the labor and capital intensive activities required for the competitive dissemination of information to-

day, publishers will have no choice but to abandon their entire function.

C.

THE COURT IMPOSES REQUIREMENT ON INDUSTRY TO SUBSIDIZE COMPETITORS IN TAKING OVER THE DISTRIBUTION FUNCTION WHICH PRODUCES REVENUE.

The publishing process can be viewed as a data stream with the intellectual material being introduced at one end, being processed through the whole series of steps required of publishers, and finally reaching the individual user. That data stream can be divided into two parts: creation and production, where the greatest costs are to be found, and distribution, where the revenues sustaining that data stream are generated.

The Court in refusing to find systematic photocopying as practiced by NLM an infringement of the publisher's copyright, substituted the NLM distribution mechanism for a distribution system of plaintiff's choosing (in this case, a simple and modest licensing

system). By so doing, the Court pushed the publisher out of the revenue generating portion of its business and substituted for it the National Library of Medicine. If sustained, the Court's decision would have a serious and severely damaging impact on the revenue generating activities of all companies in the industry nationwide, for the same reason.

NLM also markets information. By turning the distribution function over to NLM, the Court is requiring the plaintiff in this case to subsidize, through the investment it makes in creating its publications, the operations of a competitor in the field of information dissemination. This is patently inequitable and destructive of the purposes for which Congress enacted the copyright law.

D.

MAJOR ALTERATION IN THE RELATIONSHIP BETWEEN LIBRARIES AND PUBLISHERS, AND IN THE RESULTING INFORMATION DISTRIBUTION SYSTEM OF THE NATION, REQUIRES CONGRESSIONAL ACTION.

The IIA recognizes that we are on the brink of a new age. More and more of the events and artifacts of human existence are being dealt with in informational equivalents. As part of this process, new ways are being found to disseminate information. Photocopying is one of those new ways. A whole industry--the information industry--is emerging as an element of our economy--creating jobs, paying taxes and facilitating the functioning of a most complex society. This industry depends on a viable distribution system.

The distribution system based on copyright has served this nation well in the past. A mutually supportive system of

libraries and publishers has grown up built upon the copyright system. Our society is unprecedented in its openness and in having well-informed citizens capable of self-government.

What is at stake in this case is whether the viable distribution system based on copyright law established by Congress should be disrupted for the social policy reasons suggested by the Court of Claims. That court felt science should be exempt from copyright infringement and the practical effect of that decision would be to alter the basic relationship between libraries and publishers by judicial decision.

We believe there are policy questions of far-reaching effect not only for the nature of the nation's information distribution system, but for the way our society obtains and uses information. These are

questions requiring the full participation of the Congress and through it the people of the United States.

We urge, therefore, that the copyright system be upheld, that the decision of the Court of Claims be reversed, and that the Court find that systematic photocopying of copyrighted materials as practiced by NIH and NLM constitutes infringement.

Respectfully submitted,

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